

Filed July 26, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	Case No.: 06-C-13229
)	
MICHAEL ALAN GIULIANTI)	RECOMMENDATION OF SUMMARY
)	DISBARMENT
A Member of the State Bar)	
_____)	

On December 19, 2006, respondent, Michael Alan Giuliani, pled nolo contendere to violating Florida Statutes section 831.09, uttering a forged instrument, in the Broward County Circuit Court in Florida.¹ His plea was entered, the court withheld adjudication of guilt, and placed him on three years probation. The time period in which to file an appeal has expired. The State Bar filed a request for a recommendation of summary disbarment on March 26, 2007. After carefully reviewing all pleadings, the State Bar's request for a recommendation of summary disbarment is granted.

On April 3, 2007, respondent filed an opposition to the State Bar's request, contending, inter alia, that his plea of nolo contendere in which the court withheld adjudication of guilt is not a "conviction" for the purposes of imposing attorney discipline, and that the Florida crime to which respondent pled nolo contendere would not constitute a felony under California law.

On May 29, 2007, we requested supplemental briefing focusing on two issues: 1) whether the requirement set forth in Business and Professions Code section 6102, subdivision (d)(2), has

¹Florida Statutes § 831.09 provides that "[w]hoever utters or passes or tenders in payment as true, any such false, altered, forged, or counterfeit note, or any bank bill, check, draft, or promissory note, payable to the bearer thereof or to the order of any person, issued as aforesaid, knowing the same to be false, altered, forged, or counterfeit, with intent to injure or defraud any person, commits a felony of the third degree."

been established when the elements of the offense for which respondent was convicted in Florida could constitute a misdemeanor under the laws of California; and 2) whether the requirement set forth in Business and Professions Code section 6102, subdivision (c), that there be a final judgement of conviction, or an order granting probation and suspending the imposition of the sentence, has been satisfied when respondent entered a nolo contendere plea and the Florida court withheld adjudication of guilt. Both parties submitted briefs regarding the questions presented.

Addressing the first question, respondent contends that since his offense would be a “wobbler” in California² (*People v. Corpuz* (2006) 38 Cal. 4th 994, 991 [meaning that it may be charged or judged either as a misdemeanor or a felony]), the Florida crime cannot be read to be a felony for the purposes of attorney discipline in California. In support of his argument, respondent relies on Business and Professions Code section 6102, subdivision (d)(2), that provides a conviction under the laws of another state will be deemed a felony if the “elements of the offense for which the member was convicted would constitute a felony under the laws of the State of California at the time the offense was committed.” According to respondent, his Florida conviction does not satisfy this requirement since his offense could have been filed as a misdemeanor in California.

In California, when an offense can be punishable as either a felony or misdemeanor, the offense remains a felony for every purpose up to judgment. (*People v. Banks* (1959) 53 Cal.2d

²The corollary crime is Penal Code section 476, which provides that “[e]very person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery.”

370, 381; *People v. Bozigian* (1969) 270 Cal.App.2d 373, 379.) “Unless and until a misdemeanor sentence is imposed, a conviction for an offense alternatively punishable as a misdemeanor or a felony, remains a felony for all purposes. [Citation.]” (*People v. Bozigian, supra*, 270 Cal.App.2d at p. 379.) Likewise, under Business and Professions Code section 6102, a wobbler offense remains a felony for the purpose of attorney discipline even if reduced to a misdemeanor later, so long as the crime was charged as a felony at the time a plea of nolo contendere was entered. (Bus. & Prof. Code, § 6102, subd. (b); *In the Matter of Jackson* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 610, 613-614.) Thus, only in those cases where the offense is reduced to a misdemeanor at the time the plea or verdict is entered is the conviction considered a misdemeanor for the purpose of discipline. (*In the Matter of Jackson, supra*, 4 Cal. State Bar Ct. Rptr. 610, 613-614.)

In the instant matter, respondent was charged with and pled nolo contendere to a felony. The elements of Florida Statutes section 831.09 would constitute a felony under California law at the time of commission. (Pen. Code, § 476.) Therefore, under California law, the offense remains a felony and is considered as such for the purpose of attorney discipline.

Addressing question two, respondent argues that because the court withheld adjudication of guilt there is no final “conviction” as required by Business and Professions Code section 6102, subdivision (c), for purposes of summary disbarment. According to respondent, under Florida criminal law, a conviction requires the court to enter a formal judgment of guilt.

In Florida, a nolo contendere plea in which the court withholds adjudication of guilt is not considered a conviction under all circumstances. (See, e.g., *Childers v. Department of Environmental Protection* (Fla. 1997) 696 So.2d 962 [concluding that a defendant’s salt water

products license was wrongfully suspended because the statutory provisions did not define withholding an adjudication of guilt as a conviction]). When deciding whether a nolo contendere plea is a conviction when the adjudication of guilt is withheld, Florida looks to the relevant statutory language. (*Montgomery v. State* (Fla. 2005) 897 So.2d 1282, 1286 [for the purposes of sentencing, a conviction includes a plea of nolo contendere in which adjudication is withheld]; see also Fla. Stat. § 943.325, subd. (d) [providing that for the purpose of submitting blood samples for DNA, a “conviction shall include a finding of guilty, or entry of a plea of nolo contendere or guilty, regardless of adjudication”]; see also Fla. Stats. § 775.13 [requiring the registration of convicted felons, and provides that the term “convicted” means a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld].) Thus, when the intent is to include withholding the adjudication of guilt within the definition of a conviction, it is expressed in “explicit terms.” (*State v. T.T.* (Fla. 1st DCA 2000) 773 So.2d 586, 587.)

As for attorney discipline cases in Florida, a “determination of guilt” includes cases in which the attorney enters a plea of no contest and the trial court withholds adjudication of guilt for the offense. (Rules Regulating the Florida Bar, rule 3-7.2, subdivision (a)(2).) Under rule 3-7.2, subdivision (a)(3), of the Rules Regulating the Florida Bar, a “convicted attorney” is defined as one who had a determination of guilt entered in a criminal proceeding. Under the Rules Regulating the Florida Bar, rule 3-7.2, subdivision (b), a “[d]etermination or judgment of guilt of a member of The Florida Bar . . . shall be admissible in proceedings under these rules and shall be conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.”

In applying the Rules Regulating the Florida Bar, the Florida Supreme Court has

suspended an attorney who pled nolo contendere to felony charges of possession of illegal drugs in which adjudication of guilt was withheld. (*Florida Bar v. Finkelstien* (Fla. 1988) 522 So.2d 372, 373 [stating that the judgement or determination of guilt of a felony is grounds for serious disciplinary sanctions].) Also, in *Florida Bar v. Bunch* (Fla. 1967) 195 So.2d 558, the court disbarred an attorney who plead nolo contendere to the charge of unlawful conversion in which adjudication of guilt was withheld and who had been placed on 20 years probation.

The equivalence that Florida makes construing a nolo contendere plea in which adjudication of guilt has been withheld to that of a “conviction” for the purpose of attorney discipline in Florida is analogous to California’s provision that allows for discipline following an order granting probation and suspending the imposition of the sentence. In Florida, a suspended sentence is only available if a person is placed on probation. (Fla Stat., §948.01, subd. (5).) If the defendant successfully completes his probation he is not a convicted person but if the probation is violated the court may then adjudicate and sentence. (*Thomas v. State* (4th DCA 1978) 356 So.2d 846, 8847; *Raulerson v. State* (2000) 763 So.2d 285, 290.) However, as noted, the successful completion of probation may be considered a “conviction” for certain purposes, including attorney discipline. Similarly, Business and Professions Code section 6102, subdivision (c), provides the authority to summarily disbar an attorney upon an order granting probation and suspending the imposition of a sentence - even when the charges are subsequently dismissed after the termination of a period of probation pursuant to California Penal Code section 1203.4 or a similar statutory provision. As both the Florida and California provision allow for the imposition of discipline, even if the charge will ultimately be dismissed, we conclude that respondent has been convicted of the offense for the purpose of attorney discipline

under California law.

The time in which respondent can appeal his conviction has expired, therefore, it is now final for the purposes of discipline in California. Respondent is member of the State Bar of California and is subject to the jurisdiction that California retains regarding his license to practice law. (*In re Pagurigan* (2001) 25 Cal.4th 1, 8-9.) Respondent's conviction provides conclusive evidence that he is guilty of uttering a forged instrument. (Bus. & Prof. Code, § 6101, subd. (a).) He is conclusively presumed to have committed all of the acts necessary to constitute the offense. (*In re Duggan* (1976) 17 Cal.3d 416, 423.) Respondent was convicted at time when summary disbarment is required if the conviction meets the requirements under Business and Professions Code section 6102, subdivision (c), as amended effective January 1, 1997. Respondent's conviction meets the requirements.

First, respondent was convicted of a felony. (Bus. & Prof. Code, § 6102, subd. (b).) Second, the intent to defraud is a specific element of the offense, and as such inherently involves moral turpitude. (See *In re Lesansky* (2001) 25 Cal.4th 11, 14.) When an attorney's conviction meets the requirements of Business and Professions Code section 6102, subdivision (c), "the attorney is not entitled to a State Bar Court hearing to determine whether lesser discipline is called for." (*In re Pagurigan* (2001) 25 Cal.4th 1, 7.) Disbarment is mandatory. (*Id.* at p. 9; see also *In re Lesansky* (2001) 25 Cal.4th 11.)

We therefore recommend that respondent, Michael Alan Giuliani, State Bar member number 237078, be summarily disbarred from the practice of law in this state. We also recommend that respondent be ordered to comply with rule 9.20 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 45 days, respectively, after the effective date of the Supreme Court's order. Finally, we recommend that

costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7, and as a money judgment.

Presiding Judge